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| UNITED STATES OF AMERICA, |) | CV-S-03-1220-JLQ |
| |) | No. 2:98-CR-347-JLQ |
| Plaintiff, |) | |
| vs. |) | MEMORANDUM OPINION |
| |) | AND ORDER DENYING PETITION |
| RICARDO MURILLO, |) | FOR WRIT OF HABEAS CORPUS; |
| |) | CERTIFICATE OF APPEALABILITY |
| Defendant. |) | |

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1 reason he waived his right to testify at trial. Because of the issues involved and the
2 sentences imposed the court appointed Daniel Albregts, an experienced and respected
3 trial and criminal defense attorney, to represent the Defendant in this 28 U.S.C. § 2255
4 proceeding. The Defendant has been incarcerated at the United States Penitentiary at
5 Leavenworth, Kansas. The court authorized Mr. Albregts to travel to Leavenworth to
6 confer with the Defendant. Thereafter, Mr. Albregts filed an amended Habeas Corpus
7 Petition.

8 By Order filed December 27, 2004 (C. R. 234), the court found that since the
9 Defendant's Habeas Corpus Petition was based upon alleged ineffective assistance of
10 counsel, the attorney-client privileges between Mr. Murillo and his trial counsel were
11 waived. Pursuant to various Orders of the court, Mr. Albregts, representing the
12 Defendant, and thereafter Ms. Damm, representing the Government, were given full
13 access to the boxes of files in the Federal Defender's office containing the pretrial and
14 trial materials accumulated by the Federal Defenders, Arthur Allen and Shari Kaufman,
15 along with their investigators and staff members. At the direction of the court, affidavits
16 from Mr. Allen and Ms. Kaufman were filed. The court authorized the taking of the
17 depositions of Mr. Allen and Ms. Kaufman and that of Ed Heddy, the lead investigator,
18 and those depositions have been reviewed and considered by the court in its ruling in this
19 matter. The court by its Memorandum Opinion And Order Denying Motion For
20 Evidentiary Hearing (C.R. 260) filed on September 26, 2006, held that an evidentiary
21 hearing was not required for the reasons stated in that Order including the fact that the
22 depositions of the defense attorneys and Mr. Heddy had been taken. After supplemental
23 briefing by both sides, the court scheduled and heard oral argument on May 8, 2007.

24 FACTUAL BACKGROUND

25 On or about August 2, 1998, Patricia Margello was killed by strangulation and the
26 breaking of her neck in Room 6 of the Del Mar Motel on Las Vegas Boulevard in Las
27 Vegas, Nevada. Her body was placed in taped plastic garbage sacks and inserted in the

1 air vent of the motel room. The Defendant was arrested and charged with the murder.
2 Also arrested and charged were Diana Hironaga and Joseph Balignosa who admitted to
3 police that they were present in the motel room when Ricardo Murillo strangled and
4 killed Margello. Also charged with being a member of the conspiracy to the killing was
5 Christopher Moseley who allegedly had promised to pay Hironaga and Murillo \$25,000
6 for the killing. At Murillo's trial Hironaga and Moseley admitted their involvement and
7 testified against the Defendant. While having confessed to a limited involvement in the
8 killing, Balignosa was not available to testify at Murillo's trial as he had been charged
9 with his involvement in state court. However, Mr. Murillo's defense team was in
10 possession of a copy of Balignosa's confession which named Murillo as the killer. The
11 factual background of the murder is further set forth in the Government's Response to
12 28 U.S.C. §2255 Motion To Vacate (C.R. 240), in the reported appellate decision at 288
13 F. 3d 1126, and in the trial transcript.

14 Upon the Defendant's arrest in August, 1998, the Federal Defenders of Nevada
15 were appointed to represent him. Attorneys Arthur Allen and Shari Kaufman were
16 assigned by that office to the case and two investigators, including Ed Heddy, were also
17 assigned to the case, along with support staff, including a para-legal. Both of the
18 attorneys, and the investigators had ongoing contact with the Defendant who was in
19 custody. Because the applicable penal portion of the federal statute under which the
20 Defendant was charged authorized the imposition of the death penalty if so determined
21 by the jury, attorneys Allen and Kaufman, along with investigator Heddy and other staff
22 members spent full-time on the case from the time of their appointment through the trial
23 in November of 1999. The attorneys and investigators researched the materials and facts
24 in an effort to convince the United States Department of Justice not to seek the death
25 penalty. After a presentation and hearing with the appropriate Department of Justice
26 officials in Washington, D. C. attorneys Allen and Kaufman were successful in
27 convincing the D.O.J. not to seek the death penalty. They thereafter devoted their full-

1 time efforts to preparation for and trial of the matter in November, 1999.

2 The background and experience of attorneys Allen and Kaufman and Investigator
3 Heddy are set forth in their depositions taken in this matter. Mr. Allen has been a
4 criminal defense lawyer since 1982. At the time of the trial of this matter, Mr. Allen had
5 represented defendants in over 100 jury trials. He had previously defended death
6 penalty cases and was death penalty qualified. Ms. Kaufman had been an attorney in the
7 Federal Defender's office for some ten years at the time of the trial of this matter. Prior
8 to that employment, Ms. Kaufman had other criminal defense experience. At the time
9 of the trial of this matter, Ms. Kaufman had represented defendants in over 30 jury trials.
10 Ed Heddy, the lead investigator in the Las Vegas Federal Defender's office, had at the
11 time of the trial of this matter, over 5 years of employment in that office. He had served
12 some 14 years as a sergeant in the Carson County Sheriff's office followed by 8 years
13 as an investigator in the Nevada State Defender's office.

14 In his conversations with the defense team, the Defendant made conflicting
15 statements as to his whereabouts on the night of the murder of Patty Margello, however,
16 he did admit that he was the person seen on the video tape at the Walgreens store shortly
17 after the murder on August 2, 1998 buying the garbage bags in which Patty Margello's
18 body was found. One of the Defendant's statements to the defense team was that he had
19 purchased the garbage bags as the result of a telephone call from Diana Hironaga, but
20 had only delivered them to the door of the motel room. The Defendant gave the names
21 of four people to the defense team as possible alibi witnesses. Those names were Mary
22 Perez; Rochelle Del Carmen; Rod Saprone, the Defendant's cousin; and Michelle Berry.
23 Mary Perez and Rochelle Del Carmen were interviewed pre-trial and called as defense
24 witnesses at trial as to the alleged presence of the Defendant at the Union Plaza Hotel
25 and Casino in downtown Las Vegas on August 1 and 2, 1998.

26 The other two individuals, Michelle Berry and Rod Saprone, were interviewed by
27 Investigator Ed Heddy, but were not called as witnesses at trial. Michelle Berry was

1 interviewed by Mr. Heddy on October 21, 1999, shortly prior to the November 9, 1999,
2 commencement of trial. She informed Mr. Heddy that she knew nothing about the
3 whereabouts of the Defendant on the evening in question. The defense team concluded
4 that Ms. Berry would not be helpful as an alibi witness at all, but could be a possible
5 witness that Diana Hironaga was “obsessed” with the Defendant Ricardo Murillo.
6 Following the Defendant’s conviction, the defense files were turned over to a private
7 attorney retained by the Defendant’s family for sentencing and appellate purposes.
8 During this time, Michelle Berry apparently wrote a post-conviction letter stating that
9 following the Defendant’s conviction she recalled that in fact the Defendant had been
10 with her from 3 a.m. of August 2, 1998 until the later hours of that morning. Obviously,
11 such a post-trial claim was not available to the trial defense attorneys as Ms. Berry had
12 previously given their investigator a statement that she had no information as to the
13 Defendant’s whereabouts on that evening.

14 The second uncalled witness was Rod Saprone. Mr. Saprone was interviewed
15 twice by Ed Heddy, the defense investigator. In the first interview and statement
16 Saprone told Heddy that he, Saprone, was not at the Union Plaza with the Defendant on
17 the night in question because he had been terminated from employment at the Plaza and
18 did not wish to return there. Saprone informed Heddy that in fact he was at the
19 Stratosphere lounge with Murillo and Joseph Balignosa on the night in question at
20 midnight. A second interview of Saprone took place at his request on October 28, 1999,
21 some two weeks prior to the commencement of the trial. In this second interview
22 Saprone stated that in fact he was at the Union Plaza with Murillo and Balignosa at
23 around midnight of August 1-2, 1998. Murillo had previously stated that such was the
24 case since it was Saprone’s birthday, which was contrary to Saprone’s true birthday
25 many months prior thereto. In view of these contradictory statements and their
26 impeachment use, the defense team determined not to call Saprone because of the
27 possible adverse reaction by the jury to such conflicting testimony.

1 The testimony of Diana Hironaga concerning the murder of Patty Margello was
2 critical in the trial since she was the only testifying eye-witness thereto, although the car
3 jumper cables found wrapped around Ms. Margello's body were claimed to be from
4 Murillo's car and a towel found in his car matched those from the Del Mar Motel. The
5 Government also introduced testimony and documentary evidence that Murillo and
6 Diana Hironaga flew round-trip from Las Vegas to Philadelphia shortly after the murder
7 to collect the cash delivered by Mr. Moseley's chauffeur to them at the Philadelphia
8 airport for the killing of Patty Margello. The testimony of Diana Hironaga and the other
9 evidence admitted established that the murder took place at approximately 3 a.m. on
10 August 2, 1998. Ms. Hironaga also testified that she was with the Defendant Murillo,
11 Balignosa, and Patty Margello earlier that evening. The defense team and attorneys
12 Allen and Kaufman therefore determined that while the testimony of the witnesses Perez
13 and Del Carmen did not constitute an alibi as to the location of the Defendant at 3 a.m.,
14 that testimony did differ from that of Diana Hironaga as to the location of the Defendant
15 prior thereto. The attorneys therefore did not file a F. R. Crim. P. 12.1 alibi Notice, but
16 utilized the Union Plaza witnesses testimony to challenge the credibility of Ms.
17 Hironaga in her testimony as to the location of the Defendant earlier in the evening,
18 suggesting to the jury that therefor the rest of Ms. Hironaga's testimony should not be
19 believed.

20 The testimony of Mary Perez that she saw the Defendant at the Union Plaza around
21 "3ish" on August 2, 1998, was somewhat uncertain as to date and time and had not been
22 presented as such by Ms. Perez in her pre-trial statement to the defense team. Ms.
23 Perez's "3ish" testimony, (at Volume VI of the trial transcript commencing at page 130),
24 caused both the prosecution and the court to raise the issue of the lack of an alibi Notice.
25 Ms. Kaufman and Mr. Allen explained that they were not offering the testimony as an
26 alibi, but rather to impeach and challenge the credibility of the testimony of Ms. Hironaga
27 as to where the Defendant was earlier in the evening. The court denied the motion of the

1 Government to strike the testimony of the Union Plaza witnesses, but precluded the
2 defense from arguing that the Defendant could not have been at the murder scene because
3 he was at the Union Plaza at the time of the murder. In accordance with their trial
4 strategy, counsel for the Defendant argued to the jury that the testimony of Ms. Hironaga
5 had been impeached and was not credible as a result of the testimony of the Union Plaza
6 witnesses as to the location of the Defendant earlier in the evening before the murder and
7 therefore her testimony should not be the basis for the Defendant's conviction.

8 ANALYSIS

9 The landmark case where a Defendant claims that he has not been afforded his
10 Sixth Amendment right to "counsel" and the effective assistance thereof, is *Strickland v.*
11 *Washington*, 466 U.S. 668 (1984). *Strickland* and its progeny establish that there are two
12 prongs for analysis in cases such as this. The first prong is the performance prong. The
13 analysis of the first prong does not allow the court to second guess the strategic or tactical
14 decisions of counsel. The decisions of counsel as to the conduct of a trial are entitled to
15 great deference. Counsel must be allowed a wide range in making decisions as to trial
16 strategy and/or tactics. The evaluation of counsel's performance must be based on
17 counsel's perspective at the time of trial. The courts of this Circuit have "repeatedly
18 refused to second-guess counsel's strategic decisions to present or forego a particular
19 theory of defense when such decision was reasonable under the circumstances." *United*
20 *States v. Layton*, 855 F. 2d 1388, 1420 (9th Cir. 1988), citing *Strickland* @ 688. See also
21 *United States v. Chambers*, 918 F. 2d 1455, 1461 (9th Cir. 1990).

22 In this case it is undisputed that the two attorneys and their investigators,
23 representing the Defendant full-time for over one year, interviewed and determined that
24 none of the four "alibi" witnesses furnished by the Defendant could, in fact, establish an
25 alibi that would lead a jury to reasonably conclude that the Defendant could not have
26 committed the murder of Patty Margello because he was at the Union Plaza at the time.
27 The attorneys, recognizing that the only murder eye-witness who would testify was Diana

1 Hironaga, reasonably adopted a trial strategy of attacking the credibility of Ms. Hironaga,
2 including her testimony that the Defendant was with her and Ms. Margello earlier in the
3 evening, at a time that the Union Plaza witnesses had the Defendant at the Union Plaza.
4 This was a reasonable trial strategy tactic and decision. Throughout the trial of this
5 matter, presided over by the undersigned, Mr. Allen and Ms. Kaufman diligently,
6 professionally, and thoroughly challenged each of the Government witnesses, particularly
7 Ms. Hironaga and Mr. Moseley, whose testimony was, along with the forensic evidence,
8 the key to the Government's case. The Defendant certainly received the assistance of
9 able, informed, and competent counsel and investigators. The Defendant has failed to
10 establish that his attorneys' conduct transgressed the "wide range of professionally
11 competent assistance," *Strickland*, supra, @ 688, based upon those attorneys' informed
12 and reasonable strategic decisions made "upon counsel's professional assessment of the
13 facts and circumstances of the case." *Layton*, supra, @ 1420.

14 Even if this court had determined that counsels' performance did not meet the first
15 performance prong, a determination which this court has clearly not made, the court
16 would further hold that based upon the testimony and evidence presented in the trial of
17 this matter, there is no reasonable probability that the jury verdict would have been
18 different had counsel determined to defend the case on the basis of an alleged alibi.
19 *United States v. Thomas*, 417 F. 3d 1053, 1056 (9th Cir. 2005). The testimony of the two
20 Union Plaza witnesses, Perez and Del Carmen, found at pages 130 and 134 of Volume
21 VI of the trial transcript, did not cover the time of the murder of Patty Margello. Adding
22 the testimony of the Defendant's cousin, Rod Saprone, with his completely contrary prior
23 statement that he was not at the Union Plaza, would not have changed the result in this
24 matter. Michelle Berry had unequivocally set forth in her statement to the defense
25 investigator that she had no knowledge as to the location of the Defendant on the night
26 in question. Her post-conviction statement does not change that fact. There is no
27 "reasonable probability . . . sufficient to undermine confidence in the outcome."

1 *Strickland*, supra, @ 694; *Thomas*, supra, @ 1056.

2 Finally, the Defendant contends that because his attorneys did not present an “alibi”
3 defense, that decision somehow caused him not to testify in his own defense. That blanket
4 claim, without more, is a *non-sequitur*. The only possible credible “alibi” witnesses as
5 to the Defendant’s location during the evening in question, Mary Perez and Rochelle Del
6 Carmen, were called by the defense attorneys, and the Defendant’s decision not to testify
7 was clearly a knowledgeable and voluntary one as his responses to the court’s questions
8 prior to the defense resting show at Volume VII, pages 4-5 of the trial transcript.

9 Based upon the foregoing and the court’s May 8, 2007 rulings, IT IS HEREBY
10 ORDERED that the Motion To Vacate construed as a Petition For Writ of Habeas
11 Corpus, must be and is Denied.

12 **CERTIFICATE OF APPEALABILITY**

13 Upon the oral ruling of this court on May 8, 2007, denying the Motion To Vacate,
14 Mr. Albregts, appointed counsel for the Defendant, informed the court that he would
15 remain as counsel for the Defendant on appeal and requested this court to issue a
16 Certificate of Appealability pursuant to 28 U.S.C. § 2253(c)(1)-(3). While the court has
17 denied the Defendant’s Motion, the Defendant has made a showing, based on his
18 allegations, of a denial of a constitutional right, that being the right to the effective
19 assistance of counsel at trial.

20 The Clerk of this court shall enter this Order, enter judgment denying the Motion
21 To Vacate and the Petition For Writ of Habeas Corpus, forward copies to counsel, and
22 close this file, subject to any appeal taken herefrom. The Clerk of this court shall also
23 close file CV-S-03-1220-JLQ

24 **DATED** this 21st day of May 2007.

25 s/ Justin L. Quackenbush
26 JUSTIN L. QUACKENBUSH
27 SENIOR UNITED STATES DISTRICT JUDGE
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